

## EXHIBIT 5

**From:** [NYT-AI-SG-Service@simplelists.susmangodfrey.com](mailto:NYT-AI-SG-Service@simplelists.susmangodfrey.com) on behalf of Mark T. Rawls  
**To:** [Christopher S. Sun](#); [Nikolaides, Eric K.](#); [Allabach, Susanna](#); [Jennifer B. Maisel](#); [Kristen Logan](#); [Steven Lieberman](#); [Nasri Hage](#); [NYT-AI-SG-Service@simplelists.susmangodfrey.com](mailto:NYT-AI-SG-Service@simplelists.susmangodfrey.com); [NewYorkTimes\\_Microsoft\\_OHS@orrick.com](mailto:NewYorkTimes_Microsoft_OHS@orrick.com); [newyorktimes-microsoft-fdbr@faegredrinker.com](mailto:newyorktimes-microsoft-fdbr@faegredrinker.com); [Bryan B. Thompson](#); [Jenny L. Colgate](#); [Robert P. Parker](#); [Steven Lieberman](#); [OpenAICopyright](#); [KVP-OAI](#); [openaicopyrightlitigation.lwteam@lw.com](mailto:openaicopyrightlitigation.lwteam@lw.com)  
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**Subject:** RE: Daily News LP et al v. Microsoft Corp. et al – SDNY Case No. 1:24-cv-03285-SHS-OTW  
**Date:** Monday, November 18, 2024 4:04:49 PM  
**Attachments:** [image001.png](#)

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EXTERNAL Email

Chris,

Thank you for the update. We think this resolves the dispute, and will not file a motion today in reliance on your representations below.

Best regards,  
-Mark

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**From:** Christopher S. Sun <CSun@keker.com>  
**Sent:** Monday, November 18, 2024 4:41 PM  
**To:** Mark T. Rawls <MRawls@rothwellfigg.com>; Nikolaides, Eric K. <ENikolaides@mofo.com>; Allabach, Susanna <sAllabach@mofo.com>; Jennifer B. Maisel <jmaisel@rothwellfigg.com>; Kristen Logan <KLogan@rothwellfigg.com>; Steven Lieberman <slieberm@rothwellfigg.com>; Nasri Hage <Nhage@rothwellfigg.com>; NYT-AI-SG-Service@simplelists.susmangodfrey.com; NewYorkTimes\_Microsoft\_OHS@orrick.com; newyorktimes-microsoft-fdbr@faegredrinker.com; Bryan B. Thompson <bthompson@rothwellfigg.com>; Jenny L. Colgate <jcolgate@rothwellfigg.com>; Robert P. Parker <rparker@rothwellfigg.com>; Steven Lieberman <slieberm@rothwellfigg.com>; OpenAICopyright <OpenAICopyright@mofo.com>; KVP-OAI <KVPOAI@keker.com>; openaicopyrightlitigation.lwteam@lw.com  
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**Subject:** RE: Daily News LP et al v. Microsoft Corp. et al – SDNY Case No. 1:24-cv-03285-SHS-OTW

Hi Mark

I feel like we are talking past each other. Maybe it will help to simplify. You've made this request:

Documents and communications made in connection with Defendants' fundraising efforts involving potential investors, including but not limited to MGX, Thrive Capital, and Tiger

Global concerning any discussion of (a) this litigation or the litigation styled *The New York Times Company v. Microsoft Corporation, et al.*, Case No.: 23-cv-11195-SHS (S.D.N.Y) or (b) whether OpenAI's use of copyrighted content constitutes copyright infringement or is subject to the defense of fair use.

OpenAI will agree to conduct a reasonable search for non-privileged documents in its possession, custody, or control that are responsive to this request and produce the documents that it finds. In conducting that search, OpenAI will assess which repositories, if any, are likely to contain responsive documents, an inquiry that will encompass, but will not be limited to, data rooms that OpenAI shares with investors. However, OpenAI will not agree to blindly search repositories that it has no reason to think contain responsive documents. I really think this should resolve the dispute, and am available to discuss this by phone if, for some reason, you think it doesn't.

I remain concerned about the privilege burden, but in an effort to compromise, have broadened the offer I previously made, as noted above. We will log any responsive, privileged documents we find in the course of conducting that search. Although we may continue to have a dispute about privilege, it makes more sense to save our fight on that issue until OpenAI has performed the search, after which point the parties will know whether OpenAI has actually withheld any documents on privilege grounds and, thus, whether the parties even have an actual dispute worth fighting about.

In any event, we disagree with your read of the privilege law. SDNY does not, to my knowledge, require that parties have a common legal interest to avoid waiver of the work product privilege. The fact that you had to cite an out of Circuit case to establish that proposition, and your tortured efforts to connect that case to the case I cited, speaks for itself. But it's worth noting that the case you cite affirmatively acknowledges that SDNY courts uphold the work product privilege even after disclosure to third parties with no apparent common legal interest. *See S.E.C. v. Gupta*, 281 F.R.D. 169, 172 (S.D.N.Y. 2012). Indeed, that same case suggests that courts are more likely to uphold work product privilege claims (even after disclosure to third parties) in response to requests that are clearly aimed at ascertaining a party's legal opinions and strategy—as your request obviously is. *See id.*

Chris

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**From:** Mark T. Rawls <MRawls@rothwellfigg.com>

**Sent:** Monday, November 18, 2024 10:06 AM

**To:** Christopher S. Sun <CSun@keker.com>; Nikolaidis, Eric K. <ENikolaidis@mofo.com>; Allabach, Susanna <sAllabach@mofo.com>; Jennifer B. Maisel <jmaisel@rothwellfigg.com>; Kristen Logan <KLogan@rothwellfigg.com>; Steven Lieberman <slieberm@rothwellfigg.com>; Nasri Hage <Nhage@rothwellfigg.com>; NYT-AI-SG-Service@simplelists.susmangodfrey.com; NewYorkTimes\_Microsoft\_OHS@orrick.com; newyorktimes-microsoft-fdbr@faegredrinker.com; Bryan B. Thompson <bthompson@rothwellfigg.com>; Jenny L. Colgate <jcolgate@rothwellfigg.com>; Robert P. Parker <rparker@rothwellfigg.com>; Steven Lieberman <slieberm@rothwellfigg.com>; OpenAICopyright <OpenAICopyright@mofo.com>; KVP-OAI <KVPOAI@keker.com>; openaicopyrightlitigation.lwteam@lw.com

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**Subject:** RE: Daily News LP et al v. Microsoft Corp. et al – SDNY Case No. 1:24-cv-03285-SHS-OTW

[EXTERNAL]

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Hi Chris,

Thanks for your email. Can you confirm that in your investigation of “other channels where responsive documents might have been exchanged” that you will look for correspondence with potential acquirors and any notes of discussions with them? We are also concerned about your position that many of these documents and communications are privileged. As we have explained, neither common interest doctrine nor the work product privilege applies in these circumstances. Can you confirm you are not going to withhold responsive documents on the basis of privilege? If not, please explain the basis for your belief that there is a shared legal interest between OpenAI and potential investors, including by citing to relevant caselaw.

We need a response by 4pm ET.

Best regards,  
-Mark

**Mark Rawls**

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**From:** Christopher S. Sun <[CSun@keker.com](mailto:CSun@keker.com)>

**Sent:** Monday, November 18, 2024 11:26 AM

**To:** Mark T. Rawls <[MRawls@rothwellfigg.com](mailto:MRawls@rothwellfigg.com)>; Nikolaides, Eric K. <[ENikolaides@mofo.com](mailto:ENikolaides@mofo.com)>; Allabach, Susanna <[sAllabach@mofo.com](mailto:sAllabach@mofo.com)>; Jennifer B. Maisel <[jmaisel@rothwellfigg.com](mailto:jmaisel@rothwellfigg.com)>; Kristen Logan <[KLogan@rothwellfigg.com](mailto:KLogan@rothwellfigg.com)>; Steven Lieberman <[slieberm@rothwellfigg.com](mailto:slieberm@rothwellfigg.com)>; Nasri Hage <[Nhage@rothwellfigg.com](mailto:Nhage@rothwellfigg.com)>; [NYT-AI-SG-Service@simplelists.susmangodfrey.com](mailto:NYT-AI-SG-Service@simplelists.susmangodfrey.com); [NewYorkTimes\\_Microsoft\\_OHS@orrick.com](mailto:NewYorkTimes_Microsoft_OHS@orrick.com); [newyorktimes-microsoft-fdbr@faegredrinker.com](mailto:newyorktimes-microsoft-fdbr@faegredrinker.com); Bryan B. Thompson <[bthompson@rothwellfigg.com](mailto:bthompson@rothwellfigg.com)>; Jenny L. Colgate <[jcolgate@rothwellfigg.com](mailto:jcolgate@rothwellfigg.com)>; Robert P. Parker <[rparker@rothwellfigg.com](mailto:rparker@rothwellfigg.com)>; Steven Lieberman <[slieberm@rothwellfigg.com](mailto:slieberm@rothwellfigg.com)>; OpenAICopyright <[OpenAICopyright@mofo.com](mailto:OpenAICopyright@mofo.com)>; KVP-OAI <[KVPOAI@keker.com](mailto:KVPOAI@keker.com)>; [openaicopyrightlitigation.lwteam@lw.com](mailto:openaicopyrightlitigation.lwteam@lw.com)

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**Subject:** RE: Daily News LP et al v. Microsoft Corp. et al – SDNY Case No. 1:24-cv-03285-SHS-OTW

Mark,

You say our offer is insufficient. Why? Per my earlier email, we have offered to investigate whether or not data rooms shared with investors are likely to contain non-privileged documents of the kind your request identifies, and to search for and produce such documents, if so. And we've offered to investigate other channels where responsive documents might have been exchanged. Once we do so, we will assess whether searching those channels is proportionate to the needs of the case.

What, exactly, are you asking us to do if not that?

Based on your email, I understand that it is Plaintiffs' position that OpenAI should be searching for responsive documents in unspecified repositories **despite having no reason to think those repositories contain responsive materials**. If you move on that basis, rest assured we will inform the Court of Plaintiffs' view. Moreover, as that is Plaintiffs' apparent view of how a reasonable search should be conducted, we expect that to be the process that Plaintiffs have been using to identify materials responsive to OpenAI's RFPs. In other words, we understand Plaintiffs are reviewing and searching for responsive documents in all their repositories, without regard to the burden or whether the repositories are likely to contain responsive materials. Please confirm.

Let me know if a call would be helpful. I can make myself available.

Chris

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**From:** Mark T. Rawls <[MRawls@rothwellfigg.com](mailto:MRawls@rothwellfigg.com)>

**Sent:** Monday, November 18, 2024 7:07 AM

**To:** Christopher S. Sun <[CSun@keker.com](mailto:CSun@keker.com)>; Nikolaides, Eric K. <[ENikolaides@mofo.com](mailto:ENikolaides@mofo.com)>; Allabach, Susanna <[sAllabach@mofo.com](mailto:sAllabach@mofo.com)>; Jennifer B. Maisel <[jmaisel@rothwellfigg.com](mailto:jmaisel@rothwellfigg.com)>; Kristen Logan <[KLogan@rothwellfigg.com](mailto:KLogan@rothwellfigg.com)>; Steven Lieberman <[slieberm@rothwellfigg.com](mailto:slieberm@rothwellfigg.com)>; Nasri Hage <[Nhage@rothwellfigg.com](mailto:Nhage@rothwellfigg.com)>; NYT-AI-SG-Service@simplelists.susmangodfrey.com; NewYorkTimes\_Microsoft\_OHS@orrick.com; newyorktimes-microsoft-fdbr@faegredrinker.com; Bryan B. Thompson <[bthompson@rothwellfigg.com](mailto:bthompson@rothwellfigg.com)>; Jenny L. Colgate <[jcolgate@rothwellfigg.com](mailto:jcolgate@rothwellfigg.com)>; Robert P. Parker <[rparker@rothwellfigg.com](mailto:rparker@rothwellfigg.com)>; Steven Lieberman <[slieberm@rothwellfigg.com](mailto:slieberm@rothwellfigg.com)>; OpenAICopyright <[OpenAICopyright@mofo.com](mailto:OpenAICopyright@mofo.com)>; KVP-OAI <[KVPOAI@keker.com](mailto:KVPOAI@keker.com)>; openaicopyrightlitigation.lwteam@lw.com

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**Subject:** RE: Daily News LP et al v. Microsoft Corp. et al – SDNY Case No. 1:24-cv-03285-SHS-OTW

**[EXTERNAL]**

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Hi Chris,

Thank you for your email. OpenAI's offer to "investigate" its data rooms and other channels of communications with investors is not sufficient, and we disagree with your characterizations below.

For example, we did explain on the call, and in our email, why our request for documents is relevant to the case. Your primary concern on the call was that it would be unduly burdensome to review a large amount of responsive documents for privilege. We addressed the privilege issue both on the call and in our email below, but your concern implicitly acknowledges that there are likely to be relevant, responsive documents in identifiable locations (e.g., data rooms and other "channels"). While we focused on the common interest doctrine in our email and the call, that was because it was the *only* privilege concern you raised on the call. Even so, the work product privilege fails for the same reason as the common interest doctrine—there is no shared legal interest. The case you cite relies on *In re Sealed Case*, a D.C. Circuit case, which held that “a party waives its work product protection in civil litigation if it discloses the privileged material to anyone without ‘common interests in developing legal theories and analyses of documents.’” *S.E.C. v. Gupta*, 281 F.R.D. 169, 171 (S.D.N.Y. 2012) (quoting *In re Sealed Case*, 676 F.2d 793, 817 & n. 97 (D.C.Cir.1982)). Potential investors are not under any threat of copyright litigation for investments in OpenAI, and therefore have no shared interests in developing legal theories.

Because OpenAI is not willing to search for and produce responsive documents, we remain at an impasse.

Best regards,

-Mark

**Mark Rawls**

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**From:** Christopher S. Sun <[CSun@keker.com](mailto:CSun@keker.com)>

**Sent:** Friday, November 15, 2024 7:45 PM

**To:** Mark T. Rawls <[MRawls@rothwellfigg.com](mailto:MRawls@rothwellfigg.com)>; Nikolaides, Eric K. <[ENikolaides@mofo.com](mailto:ENikolaides@mofo.com)>; Allabach, Susanna <[sAllabach@mofo.com](mailto:sAllabach@mofo.com)>; Jennifer B. Maisel <[jmaisel@rothwellfigg.com](mailto:jmaisel@rothwellfigg.com)>; Kristen Logan <[KLogan@rothwellfigg.com](mailto:KLogan@rothwellfigg.com)>; Steven Lieberman <[slieberm@rothwellfigg.com](mailto:slieberm@rothwellfigg.com)>; Nasri Hage <[Nhage@rothwellfigg.com](mailto:Nhage@rothwellfigg.com)>; [NYT-AI-SG-Service@simplelists.susmangodfrey.com](mailto:NYT-AI-SG-Service@simplelists.susmangodfrey.com); [NewYorkTimes\\_Microsoft\\_OHS@orrick.com](mailto:NewYorkTimes_Microsoft_OHS@orrick.com); [newyorktimes-microsoft-fdbr@faegredrinker.com](mailto:newyorktimes-microsoft-fdbr@faegredrinker.com); Bryan B. Thompson <[bthompson@rothwellfigg.com](mailto:bthompson@rothwellfigg.com)>; Jenny L. Colgate <[jcolgate@rothwellfigg.com](mailto:jcolgate@rothwellfigg.com)>; Robert P. Parker <[rparker@rothwellfigg.com](mailto:rparker@rothwellfigg.com)>; Steven Lieberman <[slieberm@rothwellfigg.com](mailto:slieberm@rothwellfigg.com)>; OpenAICopyright <[OpenAICopyright@mofo.com](mailto:OpenAICopyright@mofo.com)>; KVP-OAI <[KVPOAI@keker.com](mailto:KVPOAI@keker.com)>; [openaicopyrightlitigation.lwteam@lw.com](mailto:openaicopyrightlitigation.lwteam@lw.com)

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**Subject:** RE: Daily News LP et al v. Microsoft Corp. et al – SDNY Case No. 1:24-cv-03285-SHS-OTW

Hi Mark,

Your November 11 email is inaccurate in a number of respects, and we dispute its characterizations. Most obviously, your email fails to identify the primary disagreement between the parties. Our concern with Plaintiffs' request—which you never disputed on the call—is that Plaintiffs are demanding that OpenAI conduct specific searches for specific kinds of documents **without having any reason to think that those searches will return, or the documents will contain, relevant, responsive information.** That makes no sense and wastes resources that would be better dedicated elsewhere. Your email provides a good example of this bizarre approach. You demand that we search data rooms set up by OpenAI to share documents with prospective investors to see if those documents discuss “(a) this litigation or the litigation styled *The New York Times Company v. Microsoft Corporation, et al.*, Case No.: 23-cv-11195-SHS (S.D.N.Y) or (b) whether OpenAI’s use of copyrighted content constitutes copyright infringement or is subject to the defense of fair use.” But the only basis for that demand is your personal, self-serving “expect[ation] that responsive documents would likely reside in” such data rooms. What that “expect[ation]” is based on has never been explained. So, in essence, you’re asking us to search a repository despite having no reason to think the documents you want are contained in that repository. Again, that makes no sense.

I’ll also note that your interpretation of our privilege concerns is unduly narrow. Among other things, we would expect many of the responsive documents to be protected by *work product* privilege, making the review unduly burdensome. And that privilege is not automatically waived when disclosed to a third party. See *In re Pfizer Inc. Sec. Litig.*, No. 90 CIV. 1260 (SS), 1993 WL 561125, at \*6 (S.D.N.Y. Dec. 23, 1993).



Regardless, we've taken the time to consider Plaintiffs' position and think there is some overlap that offers a path to compromise. We continue to maintain that searching repositories to satisfy Plaintiffs' bare hope that they may contain responsive materials is unduly burdensome. But, in the spirit of compromise and with respect to this specific request, OpenAI will agree to investigate whether the data rooms that OpenAI has set up for sharing documents with prospective investors are likely to contain non-privileged documents in its possession, custody, or control that discuss "(a) this litigation or the litigation styled *The New York Times Company v. Microsoft Corporation, et al.*, Case No.: 23-cv-11195-SHS (S.D.N.Y) or (b) whether OpenAI's use of copyrighted content constitutes copyright infringement or is subject to the defense of fair use." If we determine they are likely to contain such documents, we will perform a reasonable search of the data rooms for such documents. We will also perform a reasonable investigation to determine if non-privileged documents in OpenAI's possession, custody, or control that were made in connection with OpenAI's fundraising efforts involving potential investors and that discuss the above-identified issues were likely exchanged via any other channels and, if they were, assess the burden of searching those channels.

Chris

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**From:** Mark T. Rawls <[MRawls@rothwellfigg.com](mailto:MRawls@rothwellfigg.com)>

**Sent:** Wednesday, November 13, 2024 1:36 PM

**To:** Christopher S. Sun <[CSun@keker.com](mailto:CSun@keker.com)>; Nikolaides, Eric K. <[ENikolaides@mofo.com](mailto:ENikolaides@mofo.com)>; Allabach, Susanna <[SAllabach@mofo.com](mailto:SAllabach@mofo.com)>; Jennifer B. Maisel <[jmaisel@rothwellfigg.com](mailto:jmaisel@rothwellfigg.com)>; Kristen Logan <[KLogan@rothwellfigg.com](mailto:KLogan@rothwellfigg.com)>; Steven Lieberman <[slieberm@rothwellfigg.com](mailto:slieberm@rothwellfigg.com)>; Nasri Hage <[Nhage@rothwellfigg.com](mailto:Nhage@rothwellfigg.com)>; [NYT-AI-SG-Service@simplelists.susmangodfrey.com](mailto:NYT-AI-SG-Service@simplelists.susmangodfrey.com); [NewYorkTimes\\_Microsoft\\_OHS@orrick.com](mailto:NewYorkTimes_Microsoft_OHS@orrick.com); [newyorktimes-microsoft-fdbr@faegredrinker.com](mailto:newyorktimes-microsoft-fdbr@faegredrinker.com); Bryan B. Thompson <[bthompson@rothwellfigg.com](mailto:bthompson@rothwellfigg.com)>; Jenny L. Colgate <[jcolgate@rothwellfigg.com](mailto:jcolgate@rothwellfigg.com)>; Robert P. Parker <[rparker@rothwellfigg.com](mailto:rparker@rothwellfigg.com)>; Steven Lieberman <[slieberm@rothwellfigg.com](mailto:slieberm@rothwellfigg.com)>; OpenAICopyright <[OpenAICopyright@mofo.com](mailto:OpenAICopyright@mofo.com)>; KVP-OAI <[KVPOAI@keker.com](mailto:KVPOAI@keker.com)>; [openaicopyrightlitigation.lwteam@lw.com](mailto:openaicopyrightlitigation.lwteam@lw.com)

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**Subject:** RE: Daily News LP et al v. Microsoft Corp. et al – SDNY Case No. 1:24-cv-03285-SHS-OTW

[EXTERNAL]

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Hi Chris,

We first reached out to you for a meet and confer on this request more than two weeks ago, on



October 28. My email below from Monday is consistent with what we discussed last Friday. It's not clear why you need additional time to consider our position, but to the extent that you do not respond by this Friday that OpenAI is committing to search for and produce responsive documents based on this request we will consider the parties to be at an impasse.

Best regards,  
-Mark

**Mark Rawls**

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**From:** Christopher S. Sun <[CSun@keker.com](mailto:CSun@keker.com)>

**Sent:** Wednesday, November 13, 2024 3:04 PM

**To:** Mark T. Rawls <[MRawls@rothwellfigg.com](mailto:MRawls@rothwellfigg.com)>; Nikolaides, Eric K. <[ENikolaides@mofo.com](mailto:ENikolaides@mofo.com)>; Allabach, Susanna <[sAllabach@mofo.com](mailto:sAllabach@mofo.com)>; Jennifer B. Maisel <[jmaisel@rothwellfigg.com](mailto:jmaisel@rothwellfigg.com)>; Kristen Logan <[KLogan@rothwellfigg.com](mailto:KLogan@rothwellfigg.com)>; Steven Lieberman <[slieberm@rothwellfigg.com](mailto:slieberm@rothwellfigg.com)>; Nasri Hage <[Nhage@rothwellfigg.com](mailto:Nhage@rothwellfigg.com)>; [NYT-AI-SG-Service@simplelists.susmangodfrey.com](mailto:NYT-AI-SG-Service@simplelists.susmangodfrey.com); [NewYorkTimes\\_Microsoft\\_OHS@orrick.com](mailto:NewYorkTimes_Microsoft_OHS@orrick.com); [newyorktimes-microsoft-fdbr@faegredrinker.com](mailto:newyorktimes-microsoft-fdbr@faegredrinker.com); Bryan B. Thompson <[bthompson@rothwellfigg.com](mailto:bthompson@rothwellfigg.com)>; Jenny L. Colgate <[jcolgate@rothwellfigg.com](mailto:jcolgate@rothwellfigg.com)>; Robert P. Parker <[rparker@rothwellfigg.com](mailto:rparker@rothwellfigg.com)>; Steven Lieberman <[slieberm@rothwellfigg.com](mailto:slieberm@rothwellfigg.com)>; OpenAICopyright <[OpenAICopyright@mofo.com](mailto:OpenAICopyright@mofo.com)>; KVP-OAI <[KVPOAI@keker.com](mailto:KVPOAI@keker.com)>; [openaicopyrightlitigation.lwteam@lw.com](mailto:openaicopyrightlitigation.lwteam@lw.com)

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**Subject:** RE: Daily News LP et al v. Microsoft Corp. et al – SDNY Case No. 1:24-cv-03285-SHS-OTW

Hi Mark,

We are considering Plaintiffs' position and will aim to update you by Friday.

Chris

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**From:** Mark T. Rawls <[MRawls@rothwellfigg.com](mailto:MRawls@rothwellfigg.com)>

**Sent:** Monday, November 11, 2024 12:35 PM

**To:** Nikolaides, Eric K. <[ENikolaides@mofo.com](mailto:ENikolaides@mofo.com)>; Allabach, Susanna <[sAllabach@mofo.com](mailto:sAllabach@mofo.com)>; Jennifer B. Maisel <[jmaisel@rothwellfigg.com](mailto:jmaisel@rothwellfigg.com)>; Kristen Logan <[KLogan@rothwellfigg.com](mailto:KLogan@rothwellfigg.com)>; Steven Lieberman <[slieberm@rothwellfigg.com](mailto:slieberm@rothwellfigg.com)>; Nasri Hage <[Nhage@rothwellfigg.com](mailto:Nhage@rothwellfigg.com)>; [NYT-AI-SG-Service@simplelists.susmangodfrey.com](mailto:NYT-AI-SG-Service@simplelists.susmangodfrey.com); [NewYorkTimes\\_Microsoft\\_OHS@orrick.com](mailto:NewYorkTimes_Microsoft_OHS@orrick.com);

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**Subject:** RE: Daily News LP et al v. Microsoft Corp. et al – SDNY Case No. 1:24-cv-03285-SHS-OTW

[EXTERNAL]

Counsel,

I am following up on the meet and confer we had on Friday, November 8, regarding your objections to the *Daily News* Plaintiffs RFP 76. We discussed OpenAI's refusal to produce documents in response to this RFP. On the call, you identified two primary concerns that you had. First, you believed that many of the responsive documents may fall under the common interest privilege and therefore would create a burden for you to review them. Second, you questioned the relevance of the requested documents, e.g., for showing that OpenAI had copied Plaintiffs' content. On the call we explained our position that the common interest privilege does not apply here, as it requires more than a shared commercial interest, it requires a common legal interest. *E.g.*, *Fox News Network, LLC v. U.S. Dep't of The Treasury*, 739 F. Supp. 2d 515, 563 (S.D.N.Y. 2010); *Gulf Islands Leasing, Inc. v. Bombardier Cap., Inc.*, 215 F.R.D. 466, 472–73 (S.D.N.Y. 2003). Statements OpenAI made to potential investors in connection with its fundraising efforts plainly do not meet this standard. *E.g.*, *Allied Irish Banks PLC v. Bank of America NA*, 252 F.R.D. 163, 170-171 (S.D.N.Y. 2008). We also explained that the requested documents are relevant to many issues in this case—issues that are not limited, as you suggested, to showing actual copying of Plaintiffs' content. For example, these documents bear on other issues, too, such as OpenAI's knowledge of copyright infringement, willfulness, and indirect infringement.

During the call, you stated that you would not separately search for documents and communications made in connection with Defendants' fundraising efforts involving potential investors concerning any discussions of (a) this litigation or the litigation styled *The New York Times Company v. Microsoft Corporation, et al.*, Case No.: 23-cv-11195-SHS (S.D.N.Y) or (b) whether OpenAI's use of copyrighted content constitutes copyright infringement or is subject to the defense of fair use. You also said you would not consider asking anyone knowledgeable at OpenAI where such documents are located. For example, we would expect that responsive documents would likely reside in a data room that OpenAI has setup for sharing documents with potential investors. Instead of searching for responsive documents, you offered that if such documents turned up based on a search for what you referred to as the

“underlying issues” that you would not exclude the documents solely because they were within the scope of this RFP. Unless your position has changed, we are at an impasse. We ask that you commit to searching for and producing responsive documents based on *this request* or confirm that we are at an impasse by *no later than Wednesday, November 13*.

We look forward to your prompt response.

Best regards,  
-Mark

**Mark Rawls**

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---

**From:** Mark T. Rawls <[MRawls@rothwellfigg.com](mailto:MRawls@rothwellfigg.com)>

**Sent:** Tuesday, November 5, 2024 1:45 PM

**To:** Nikolaides, Eric K. <[ENikolaides@mofo.com](mailto:ENikolaides@mofo.com)>; Allabach, Susanna <[sAllabach@mofo.com](mailto:sAllabach@mofo.com)>; Jennifer B. Maisel <[jmaisel@rothwellfigg.com](mailto:jmaisel@rothwellfigg.com)>; Kristen Logan <[KLogan@rothwellfigg.com](mailto:KLogan@rothwellfigg.com)>; Steven Lieberman <[slieberm@rothwellfigg.com](mailto:slieberm@rothwellfigg.com)>; Nasri Hage <[Nhage@rothwellfigg.com](mailto:Nhage@rothwellfigg.com)>; [NYT-AI-SG-Service@simplelists.susmangodfrey.com](mailto:NYT-AI-SG-Service@simplelists.susmangodfrey.com); [NewYorkTimes\\_Microsoft\\_OHS@orrick.com](mailto:NewYorkTimes_Microsoft_OHS@orrick.com); [newyorktimes-microsoft-fdbr@faegredrinker.com](mailto:newyorktimes-microsoft-fdbr@faegredrinker.com); Bryan B. Thompson <[bthompson@rothwellfigg.com](mailto:bthompson@rothwellfigg.com)>; Jenny L. Colgate <[jcolgate@rothwellfigg.com](mailto:jcolgate@rothwellfigg.com)>; Robert P. Parker <[rparker@rothwellfigg.com](mailto:rparker@rothwellfigg.com)>; Steven Lieberman <[slieberm@rothwellfigg.com](mailto:slieberm@rothwellfigg.com)>; OpenAICopyright <[OpenAICopyright@mofo.com](mailto:OpenAICopyright@mofo.com)>; KVP-OAI <[KVPOAI@keker.com](mailto:KVPOAI@keker.com)>; [openaicopyrightlitigation.lwteam@lw.com](mailto:openaicopyrightlitigation.lwteam@lw.com)

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**Subject:** RE: Daily News LP et al v. Microsoft Corp. et al – SDNY Case No. 1:24-cv-03285-SHS-OTW

Eric,

I can be available at 4:30pm ET (1:30pm PT) on Friday. I will send an invite.

Best,  
-Mark

---

**From:** Nikolaides, Eric K. <[ENikolaides@mofo.com](mailto:ENikolaides@mofo.com)>

**Sent:** Monday, November 4, 2024 8:26 PM

**To:** Mark T. Rawls <[MRawls@rothwellfigg.com](mailto:MRawls@rothwellfigg.com)>; Allabach, Susanna <[sAllabach@mofo.com](mailto:sAllabach@mofo.com)>; Jennifer B. Maisel <[jmaisel@rothwellfigg.com](mailto:jmaisel@rothwellfigg.com)>; Kristen Logan <[KLogan@rothwellfigg.com](mailto:KLogan@rothwellfigg.com)>; Steven

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**Subject:** RE: Daily News LP et al v. Microsoft Corp. et al – SDNY Case No. 1:24-cv-03285-SHS-OTW

Mark,

Apologies for the delay. We are available to meet and confer on Friday, November 8 at 4pm ET/1pm PT. Let us know if that works for you.

Thanks,  
Eric

**Eric K. Nikolaides**  
**Associate**  
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**From:** Mark T. Rawls <[MRawls@rothwellfigg.com](mailto:MRawls@rothwellfigg.com)>

**Sent:** Monday, November 4, 2024 2:26 PM

**To:** Nikolaides, Eric K. <[ENikolaides@mofo.com](mailto:ENikolaides@mofo.com)>; Allabach, Susanna <[sAllabach@mofo.com](mailto:sAllabach@mofo.com)>; Jennifer B. Maisel <[jmaisel@rothwellfigg.com](mailto:jmaisel@rothwellfigg.com)>; Kristen Logan <[KLogan@rothwellfigg.com](mailto:KLogan@rothwellfigg.com)>; Steven Lieberman <[slieberm@rothwellfigg.com](mailto:slieberm@rothwellfigg.com)>; Nasri Hage <[Nhage@rothwellfigg.com](mailto:Nhage@rothwellfigg.com)>; NYT-AI-SG-Service@simplelists.susmangodfrey.com; [NewYorkTimes\\_Microsoft\\_OHS@orrick.com](mailto:NewYorkTimes_Microsoft_OHS@orrick.com); [newyorktimes-microsoft-fdbr@faegredrinker.com](mailto:newyorktimes-microsoft-fdbr@faegredrinker.com); Bryan B. Thompson <[bthompson@rothwellfigg.com](mailto:bthompson@rothwellfigg.com)>; Jenny L. Colgate <[jcolgate@rothwellfigg.com](mailto:jcolgate@rothwellfigg.com)>; Robert P. Parker <[rparker@rothwellfigg.com](mailto:rparker@rothwellfigg.com)>; Steven Lieberman <[slieberm@rothwellfigg.com](mailto:slieberm@rothwellfigg.com)>; OpenAICopyright <[OpenAICopyright@mofo.com](mailto:OpenAICopyright@mofo.com)>; KVP-OAI <[KVPOAI@keker.com](mailto:KVPOAI@keker.com)>; [openaicopyrightlitigation.lwteam@lw.com](mailto:openaicopyrightlitigation.lwteam@lw.com)

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**Subject:** RE: Daily News LP et al v. Microsoft Corp. et al – SDNY Case No. 1:24-cv-03285-SHS-OTW

**External Email**

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Counsel,

I'm following up on my request from last week for a meet and confer on the responses and objections you served on Plaintiffs' second set of requests for production of documents.

Your objection that the request "encompass[es] subject matter far beyond the issues in this case" appears to ignore the request we are making. The request seeks "Documents and communications made in connection with Defendants' fundraising efforts involving potential investors, including but not limited to MGX, Thrive Capital, and Tiger Global concerning any discussion of (a) this litigation or the litigation styled *The New York Times Company v. Microsoft Corporation, et al.*, Case No.: 23-cv-11195-SHS (S.D.N.Y) or (b) whether OpenAI's use of copyrighted content constitutes copyright infringement or is subject to the defense of fair use." (emphasis added).

Please reply promptly to let us know a time when we may meet and confer on this issue.

Best regards,  
-Mark

**Mark Rawls**

Rothwell, Figg, Ernst & Manbeck, P.C.  
901 New York Avenue, N.W. Suite 900 East, Washington, D.C. 20001  
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**From:** Mark T. Rawls <[MRawls@rothwellfigg.com](mailto:MRawls@rothwellfigg.com)>

**Sent:** Monday, October 28, 2024 6:21 PM

**To:** Nikolaides, Eric K. <[ENikolaides@mofo.com](mailto:ENikolaides@mofo.com)>; Allabach, Susanna <[sAllabach@mofo.com](mailto:sAllabach@mofo.com)>; Jennifer B. Maisel <[jmaisel@rothwellfigg.com](mailto:jmaisel@rothwellfigg.com)>; Kristen Logan <[KLogan@rothwellfigg.com](mailto:KLogan@rothwellfigg.com)>; Steven Lieberman <[slieberm@rothwellfigg.com](mailto:slieberm@rothwellfigg.com)>; Nasri Hage <[Nhage@rothwellfigg.com](mailto:Nhage@rothwellfigg.com)>; [NYT-AI-SG-Service@simplelists.susmangodfrey.com](mailto:NYT-AI-SG-Service@simplelists.susmangodfrey.com); [NewYorkTimes\\_Microsoft\\_OHS@orrick.com](mailto:NewYorkTimes_Microsoft_OHS@orrick.com); [newyorktimes-microsoft-fdbr@faegredrinker.com](mailto:newyorktimes-microsoft-fdbr@faegredrinker.com); Bryan B. Thompson <[bthompson@rothwellfigg.com](mailto:bthompson@rothwellfigg.com)>; Jenny L. Colgate <[jcolgate@rothwellfigg.com](mailto:jcolgate@rothwellfigg.com)>; Robert P. Parker <[rparker@rothwellfigg.com](mailto:rparker@rothwellfigg.com)>; Steven Lieberman <[slieberm@rothwellfigg.com](mailto:slieberm@rothwellfigg.com)>; OpenAICopyright <[OpenAICopyright@mofo.com](mailto:OpenAICopyright@mofo.com)>; KVP-OAI <[KVPOAI@keker.com](mailto:KVPOAI@keker.com)>; [openaicopyrightlitigation.lwteam@lw.com](mailto:openaicopyrightlitigation.lwteam@lw.com)

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**Subject:** RE: Daily News LP et al v. Microsoft Corp. et al – SDNY Case No. 1:24-cv-03285-SHS-OTW

Counsel,

Please let us know a time this week when you are available for a meet and confer to discuss your objection.

Best regards,  
-Mark

**Mark Rawls**

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**From:** Nikolaides, Eric K. <[ENikolaides@mofo.com](mailto:ENikolaides@mofo.com)>

**Sent:** Monday, October 28, 2024 4:58 PM

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**Subject:** RE: Daily News LP et al v. Microsoft Corp. et al – SDNY Case No. 1:24-cv-03285-SHS-OTW

Adding the MoFo, Latham, and Kecker listservs that were inadvertently left off the original email.

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**Subject:** Daily News LP et al v. Microsoft Corp. et al – SDNY Case No. 1:24-cv-03285-SHS-OTW

Counsel:

Attached please find:

1. OPENAI DEFENDANTS' RESPONSES AND OBJECTIONS TO PLAINTIFF'S SECOND SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS

Thank you.

**Susanna Allabach** (She/Her)

Legal Secretary

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